

31 Box 4 - JGR/Appointments Clause (2) - Roberts, John G.: Files  
SERIES I: Subject File

THE WHITE HOUSE

WASHINGTON

March 6, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Appointments Clause Controversy

As you know, the Administration has expressed constitutional concerns about Public Law 98-101, the statute establishing the Commission to Coordinate the Commemoration of the Bicentennial of the Constitution. These concerns, expressed by the President in a signing statement, center on the role of the Chief Justice, Speaker of the House, and President pro tempore of the Senate on the Commission, and the consistency of that role with the Separation of Powers and the Incompatibility Clause. The President expressed the view that the heads of the other two branches could exercise only advisory and ceremonial functions under the Act.

Senator Hatch responded to the President's statement in an October 20, 1983 letter to Edwin Meese. Hatch argued that the Incompatibility Clause was not violated when Congressmen served without pay on temporary commissions, even if the commissions have more than advisory powers. On December 9, 1983, the Congressional Research Service of the Library of Congress issued an analysis supporting Hatch's views. On February 2, 1984 Assistant Attorney General Ted Olson responded to the CRS study in a memorandum for the Attorney General. On February 7, Olson forwarded that memorandum to you, along with a letter to Hatch, over Assistant Attorney General Robert McConnell's signature, noting that the Department was not persuaded by the CRS analysis.

On February 22, Olson sent you a memorandum to alert you to related developments concerning H.R. 1492 and S. 500, The Christopher Columbus Quincentenary Jubilee Act. Last year the Justice Department objected to S. 500 on the ground that it violated the Appointments Clause by specifying that the Majority Leader of the Senate and Speaker of the House would appoint members to the Commission. The Senate Judiciary Committee agreed and appropriately revised the bill to provide that the members be appointed by the President (albeit on the recommendation of the Majority Leader and Speaker). On February 1, 1984, during floor debate on S. 500, the Senate also deleted the Secretary of the Smithsonian Institution as a member of the Commission, expressly to bring the bill into compliance with the Appointments

Clause (the Secretary is not appointed by the President). The critical point, in Olson's view, was that the Committee explicitly recognized that the initiation and conducting of commemorative activities was a function that could only be performed by an Officer of the United States.

In other words, the Judiciary Committee has taken the Justice Department's side in the dispute between Hatch and the Justice Department.

You wanted to see me about the Bicentennial Commission. There is no urgency to the matter that I can see, although the issue needs to be finally resolved before the members of the Commission can be appointed and the Commission can begin its work.

WHITE HOUSE  
CORRESPONDENCE TRACKING WORKSHEET☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence  
Received (YY/MM/DD) 1 1Name of Correspondent: Ted Olson☐ MI Mail Report

User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: Commission on the Bicentennial  
of the Constitution (encloses copy of Feb 284  
ltr. to Sen. Hatch)

## ROUTE TO:

## ACTION

## DISPOSITION

| Office/Agency (Staff Name) | Action Code             | Tracking Date YY/MM/DD | Type of Response | Code | Completion Date YY/MM/DD |
|----------------------------|-------------------------|------------------------|------------------|------|--------------------------|
| <u>CUHOLL</u>              | ORIGINATOR              | <u>84,102,109</u>      |                  |      | <u>1 1</u>               |
| <u>CUAT 18</u>             | Referral Note: <u>A</u> | <u>84,102,109</u>      |                  |      | <u>1 1</u>               |
|                            | Referral Note:          | <u>1 1</u>             |                  |      | <u>1 1</u>               |
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|                            | Referral Note:          | <u>1 1</u>             |                  |      | <u>1 1</u>               |

## ACTION CODES:

A - Appropriate Action  
C - Comment/Recommendation  
D - Draft Response  
F - Furnish Fact Sheet  
to be used as EnclosureI - Info Copy Only/No Action Necessary  
R - Direct Reply w/Copy  
S - For Signature  
X - Interim Reply

## DISPOSITION CODES:

A - Answered  
B - Non-Special Referral  
C - Completed  
S - Suspended

## FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer  
Code = "A"  
Completion Date = Date of Outgoing

Comments: \_\_\_\_\_

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Office of the  
Assistant Attorney General

2/7/84

Fred —

(1) I am also enclosing for you a copy of my ~~draft~~ letter to Senator Hatch — which I've sent to McConnell for transmission

(2) Give Ed Meese a copy of my memo to you if you wish. I have sent him a copy of my memo to the A.G. He is interested in what is going on here

TBR



United States Department of Justice  
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL COUNSEL

FEB 7 1984

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MEMORANDUM FOR FRED F. FIELDING  
COUNSEL TO THE PRESIDENT

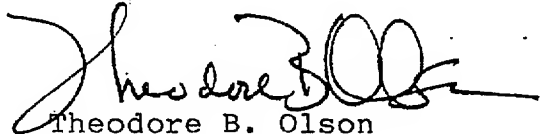
Re: Commission on the Bicentennial of the Constitution

Enclosed is our memorandum dated February 2, 1984, concerning Senator Hatch's letter and the Congressional Research (CRS) memorandum on the Commission on the Bicentennial of the Constitution. As you will see from our memorandum, we are not persuaded by the arguments set forth in the CRS memorandum. Most of the CRS memorandum discusses authorities that are simply not relevant to issues regarding the Appointments and Incompatibility Clauses. With respect to these specific issues, Buckley clearly sets forth the relevant standard, which seems to resolve the question with respect to the Commission. Even under the standards that were applied prior to Buckley, we see no way of characterizing a commission that will last for six years and possess certain clearly executive functions, as not subject to the Appointments and Incompatibility Clauses.

In any event, we regard this entire dispute as something of a tempest in a teapot because even given our conclusions, there will be little impact on the actual operation of the Commission. The statutorily designated individuals may still serve on the Commission; they must simply refrain from performing any executive functions. We do not believe that this restriction will be a major inconvenience or that it will impair the Commission's functions in any way. On the other hand, there are very good reasons for imposing this minor adjustment on the duties of the statutorily designated Commissioners. It would be ironic indeed if the Commission on the Bicentennial of the Constitution were subject to challenge because of an unconstitutional appointment procedure that allowed non-Officers of the United States to participate in executive functions that should properly be performed only by duly appointed Officers.

You also asked us how our opinion relates to the Advisory Committee on Federal Pay. That Committee, created to assist the President in carrying out the provisions of the Pay Comparability Act, performs only advisory functions. See 5 U.S.C. § 5306 (1982). Moreover, the individuals on that Committee are, in any event, appointed by the President. Thus, that Committee does not seem to raise any Appointments or Incompatibility Clause questions.

Finally, we note that some of the controversy with respect to the Commission might be alleviated if the President were actually to appoint the Chief Justice as one of the Commission members not specified by the statute. There is no Incompatibility Clause problem with respect to the Chief Justice, and presidential appointment might remove the Appointments Clause difficulties created by Congress's designation of the Chief Justice as a member. This might be a somewhat awkward mechanism, however, and this possibility raises other separation of powers questions which we intend to discuss in a separate memorandum to you. Attorney General Designate Meese has raised a similar question with us regarding the Chief Justice's position, and the three of us might want to get together to discuss this.

A handwritten signature in dark ink, appearing to read 'Theodore B. Olson', with a stylized flourish at the end.

Theodore B. Olson  
Assistant Attorney General  
Office of Legal Counsel

Attachments

# WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

PG002-01

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence  
Received (YY/MM/DD) 1 1Name of Correspondent: Herndon B. Olson☐ MI Mail Report

User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: Appointments Clause of the  
Constitution (Commission of the Bicentennial  
of the Constitution)

## ROUTE TO:

## ACTION

## DISPOSITION

Office/Agency (Staff Name)

Action  
CodeTracking  
Date  
YY/MM/DDType  
of  
Response

Code

Completion  
Date  
YY/MM/DDORIGINATOR: 8410222Referral Note: A 8410223Referral Note: 1 1Referral Note: 1 1Referral Note: 1 1Referral Note: 1 1

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EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

Honorable Howard Baker  
United States Senate  
Washington, D.C. 20510

Dear Howard:

This letter reaffirms the Administration's position on a provision in the Senate version of the 1985 Continuing Resolution that would reduce the number of commissioners on the Interstate Commerce Commission from seven to five effective October 1, 1984.

The 1982 Reconciliation Act provided for a reduction of commissioner positions in gradual steps, from eleven existing prior to 1982, to the current seven, to five by the end of calendar year 1985. Accordingly, last August I submitted three nominations to the Senate to fill seats on a seven member commission. The Senate confirmed all three nominees earlier this month. One of these most recent appointees that would be removed by the language proposed in the Continuing Resolution.

In light of the 1982 decision to reduce the number of commissioners in an orderly fashion and the recent confirmation of new commissioners, it is difficult to resist the conclusion that this provision is an effort to lay the groundwork for reregulation of surface transportation, to which I must object.

Even more important, however, is the manner in which the Senate bill would effect this change in policy. Commission appointments are made pursuant to the constitutional balance of power under which the President nominates and the Senate confirms. That balance is upset, however, when the Congress in effect chooses among Presidential nominees by the abolition of specifically designated seats, over the President's objection, during the term of an incumbent's appointment.

I urge the Senate to withdraw this provision from the pending 1985 Continuing Resolution. I believe it is premature to start changing the careful compromises worked out in 1982 and that it would be a bad precedent to withdraw support from Presidential appointees who have been confirmed by the Senate and are serving specific terms of office.

Sincerely,

## Calendar No. 1057

98TH CONGRESS  
2D SESSION

## S. 2852

[Report No. 98-561]

Making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1985, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JULY 17, 1984

Mr. ANDREWS, from the Committee on Appropriations, reported, under authority of the order of the Senate of June 29 (legislative day, June 25), 1984, the following original bill; which was read twice and placed on the calendar

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## A BILL

Making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1985, and for other purposes.

- 1      *Be it enacted by the Senate and House of Representa-*
- 2      *tives of the United States of America in Congress assembled,*
- 3      That the following sums are appropriated, out of any money
- 4      in the Treasury not otherwise appropriated, for the Depart-
- 5      ment of Transportation and related agencies for the fiscal
- 6      year ending September 30, 1985, and for other purposes,
- 7      namely:

1 *ther*, That the Board shall expend not to exceed \$102,597  
2 per year to restore guaranteed essential air transportation at  
3 Hazleton, Pennsylvania, to the minimum level of service of  
4 two round trip flights per day, five days per week, to either  
5 Philadelphia, Pennsylvania, or New York, New York, as  
6 determined by the community.

7 INTERSTATE COMMERCE COMMISSION

8 SALARIES AND EXPENSES

9 For necessary expenses of the Interstate Commerce  
10 Commission, including services as authorized by 5 U.S.C.  
11 3109, and not to exceed \$1,500 for official reception and  
12 representation expenses, \$48,000,000: *Provided*, That joint  
13 board members and cooperating State commissioners may  
14 use Government transportation requests when traveling in  
15 connection with their official duties as such: *Provided further*,  
16 That (a) effective October 1, 1984, section 10301(b) of title  
17 49, United States Code, is amended (1) by striking out "7"  
18 and inserting in lieu thereof "5", and (2) by striking out "4  
19 members" and inserting in lieu thereof "3 members".

20 (b) The office as member of the Interstate Commerce  
21 Commission, referred to in section 502(c) of the Omnibus  
22 Budget Reconciliation Act of 1982, Public Law 97-253,  
23 which is scheduled, pursuant thereto, to be abolished as of  
24 January 1, 1986, is hereby abolished, effective October 1,  
25 1984.

1 (c) The office as member of the Interstate Commerce  
2 Commission, the term for which is prescribed by law to  
3 expire on December 31, 1988, is abolished, effective October  
4 1, 1984.

5 (d) Effective October 1, 1984, section 502(d) of the Om-  
6 nibus Budget Reconciliation Act of 1982 is repealed: *Provid-*  
7 *ed, however,* That the person serving in the office described in  
8 subparagraph (d) of section 502, on July 1, 1984, may be  
9 reappointed to fill that office for a term which would end on  
10 December 31, 1985, notwithstanding the provisions of sec-  
11 tion 10301(c) of title 49, United States Code, but may not be  
12 reappointed to fill that office for any term thereafter.

13 PAYMENTS FOR DIRECTED RAIL SERVICE

14 None of the funds provided in this Act shall be available  
15 for the execution of programs the obligations for which can  
16 reasonably be expected to exceed \$1,000,000 for directed rail  
17 service authorized under 49 U.S.C. 11125 or any other  
18 legislation.

19 PANAMA CANAL COMMISSION

20 OPERATING EXPENSES

21 For operating expenses necessary for the Panama Canal  
22 Commission, including hire of passenger motor vehicles and  
23 aircraft; uniforms or allowances therefor, as authorized by  
24 law (5 U.S.C. 5901-5902); not to exceed \$8,000 for official  
25 reception and representation expenses of the Board; oper-

DEPARTMENT OF TRANSPORTATION AND RELATED  
AGENCIES APPROPRIATION BILL, 1985

JULY 17, 1984.—Ordered to be printed

Filed under authority of the order of the Senate of JUNE 29 (legislative day, JUNE 25), 1984

Mr. ANDREWS, from the Committee on Appropriations,  
submitted the following

## REPORT

[To accompany S. 2852]

The Committee on Appropriations herewith reports an original bill (S. 2852) making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1985, and for other purposes, and presents information relative to its recommendation.

## AMOUNTS OF NEW BUDGET (OBLIGATIONAL AUTHORITY) FOR FISCAL YEAR 1985

|   |                  |
|---|------------------|
| Amount of bill reported by the House..... | \$11,783,772,584 |
| Amount of bill as reported to Senate..... | 11,658,231,584   |
| Amount of budget estimates, 1985 .....    | 11,783,836,584   |

| Office                                  | Fiscal year<br>1985 budget<br>request | House<br>allowance | Commit-<br>tee recom-<br>mendations |
|---|---------------------------------------|--------------------|-------------------------------------|
| Compliance and Consumer Assistance..... | \$14,356,000                          | \$14,550,000       | \$13,230,500                        |
| Staff-years.....                        | (280)                                 | (280)              | (260)                               |
| Managing Director .....                 | \$6,482,000                           | \$6,450,000        | \$5,740,000                         |
| Staff-years.....                        | (98)                                  | (98)               | (88)                                |
| Total.....                              | \$53,966,000                          | \$54,550,000       | \$48,000,000                        |
| Staff-years.....                        | (987)                                 | (998)              | (904)                               |

*Commissioners and their offices.*—The Committee's bill language reduces the number of Commissioners from seven to five starting in fiscal year 1985. The effect of this would reduce the budget request by approximately \$1,000,000, to \$3,976,000. In addition, the Committee expects further savings can be achieved by reducing the Chairman's office by 2 staff-years and each remaining Commissioner's staff by 1 staff-year and the satellite offices associated with the Chairman's position by 10 staff-years.

*Secretary.*—The Committee expects that the recommendation would require this Office to reduce staff-years by 10.

*General Counsel.*—This Office would experience a six person staff-year reduction. The Committee does not expect this reduction to impair the Commission's ability to conduct judicial review.

*Proceedings.*—The Committee is of the understanding that a major review is now under way within the Office of Proceedings and that there is potential for major reductions in that Office. The Committee recommendation would further reduce that Office to a level of 160 staff-years.

*Hearings.*—The Committee does not intend that further reductions be made in this Office. The Committee does not want to jeopardize the Commission's ability to handle oral arguments.

*Special Counsel.*—The Committee concurs with the House position which disallows the Commission's proposal to abolish the Office of Special Counsel. This Office services the public interest and is relied on heavily by small shippers, small rural communities, and public utility officials.

*Transportation Analysis.*—This Office, which was proposed for less of a proportionate reduction than other offices, is engaged in analysis and long-range planning. Though this Office might serve to inform the Congress and the public about the implications of deregulation and the current economic status of the various activities monitored by the Commission, it has rather served to promote further deregulation by administrative fiat. The Committee recommends that this Office be reduced an additional 11 staff positions.

*Accounts.*—The Committee has not recommended further reductions in this Office. It is concerned that the Commission have sufficient resources to discharge its continuing statutory responsibilities for economic regulation.

**Traffic**—The Committee does not want to impair the primary mission of this Office, the filing and maintenance of the public tariff file. Tariff information is necessary for legal rate determinations and forms the basis for possible complaint filings.

**Compliance and Consumer Assistance**—Based on the May 24, 1984, GAO report which clearly documents a tragic situation in this Office, the Committee has no alternative but to rescind its prior support of this program until the pervasive and serious deficiencies have been corrected. The GAO report stated that lead officials in this program were not aware of congressional direction in this area as to priorities or intent in the current legislation. GAO found further that the Commission has not developed clear and consistent program goals in light of policy changes resulting from regulatory reforms in 1980 and 1982.

The Committee will consider additional enforcement resources only if and when the Commission has demonstrated major progress in correcting the deficiencies noted.

#### STAFFING

The Committee expects that a number of organizational changes will have to be made to meet its directions and it suggests the following organization considerations:

- merge the Small Business Assistance Office into the Office of Compliance and Consumer Assistance;
  - move the Equal Opportunity Office into Personnel;
  - better coordinate the overlapping or duplicative functions of the Office of Proceedings and the Office of Hearings;
  - review and suggest moving some regional and field office responsibilities back to the central office; and
  - fully and effectively utilize review boards.
- The proposed reductions would require elimination of duplicative functions, for example, the interpretation function from OCCA; and discretionary studies and undertakings by many offices, specifically Transportation Analysis.

#### OPEN MEETINGS

During hearings with the Interstate Commerce Commission, the Committee expressed its strongly felt concern that the agency had not held a public meeting since October 1982. During that period of time, almost 3,000 votes were cast using the notation voting process, including votes on such controversial matters as boxcar deregulation and coal price guidelines. The ICC was directed by the Committee to immediately change its process and open its meetings in order to comply with both the spirit and intent of the 1976 Government in the Sunshine Act. Since then on May 10, 1984, the ICC did hold an open meeting to amend its rules on meetings to require all significant issues to be voted on in public meetings. The new rule also permits any Commission member to request an open meeting on any item considered by that individual commissioner to be significant.

The Committee directs the ICC to follow the intent and spirit of both the Sunshine Act and its newly adopted rule. If only a small percentage of votes is conducted at open meetings, the Committee will not be satisfied and additional oversight hearings will be called.

#### UNIFORM RAIL COSTING SYSTEM

The Committee notes that the Interstate Commerce Commission is preparing to issue the uniform rail costing system (URCS). The Railroad Accounting Principles Board, under the Staggers Rail Act, has a mandate to evaluate the ICC's changes in rail accounting practices. Therefore, the Commission is directed to withhold the implementation of URCS until such time as the Railroad Accounting Principles Board has had an opportunity to review railroad accounting principles and report back to this Committee.

#### COMMISSIONERS

The Committee has included bill language which would reduce the number of Commissioners to five effective October 1, 1984, which is a reduction from the authorized level of seven. The effect of the Committee's action is a net savings of approximately \$1,000,000, and the promotion of more efficiency and economy within the Commission.

The appropriate and required mix of Commissioners by political affiliation shall remain the same. In other words, with a five-member Commission, the party of the President shall have three seats and the other major party shall have two seats.

#### PAYMENTS FOR DIRECTED RAIL SERVICE (LIMITATION ON OBLIGATIONS)

|                               |               |
|-------------------------------|---------------|
| Limitations, 1984.....        | (\$5,000,000) |
| Budget estimate, 1985.....    | (10,000,000)  |
| House allowance.....          | (1,000,000)   |
| Committee recommendation..... | (1,000,000)   |

Under the provisions of 49 U.S.C. 11125, when a rail carrier is in such financial trouble that it becomes impossible to continue its operations, the Commission is empowered to direct and pay another carrier to move that carrier's traffic for a period of up to 60 days, which can be extended for an additional 180 days if cause exists. In certain cases, the Commission's use of this authority has not resulted in any cost to the Federal Government. However, there have been several instances where the use of this authority has resulted in a significant liability for payment to an operating carrier by the Federal Government.

The Committee provided an obligation limitation of \$1,000,000 for fiscal year 1985, even though no additional directed rail service is anticipated for 1985. In the event that such authority needs to be exercised by the Commission, proper and timely notification to Congress is required. The limitation is the same as the House allowance.